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9 UNITED STATES DISTRICT COURT  
10 WESTERN DISTRICT OF WASHINGTON  
11 AT TACOMA

12 RAFAEL RIVERA,

13 Plaintiff,

14 v.

15 CITY OF LACEY, *et al.*,

16 Defendants.  
17

Case No. C08-5719 RBL/KLS

ORDER TO SHOW CAUSE

18 This matter has been referred to Magistrate Judge Karen L. Strombom pursuant to 28 U.S.C. §  
19 636(b)(1), Local Rules MJR 3 and 4, and Federal Rule of Civil Procedure 72. The case is before the  
20 Court upon review of Plaintiff's complaint. After reviewing the Complaint and balance of the record, the  
21 Court finds and orders as follows:

22 A complaint is frivolous when it has no arguable basis in law or fact. *Franklin v. Murphy*, 745  
23 F.2d 1221, 1228 (9<sup>th</sup> Cir. 1984). When a complaint is frivolous, fails to state a claim, or contains a  
24 complete defense to the action on its face, the court may dismiss an *in forma pauperis* complaint before  
25 service of process under 28 U.S.C. § 1915(d). *Noll v. Carlson*, 809 F.2d 1446, 1448 (9<sup>th</sup> Cir. 1987) (*Icting*  
26 *Franklin v. Murphy*, 745 F.2d 1221, 1227 (9<sup>th</sup> Cir. 1984)).

27 To state a claim under 42 U.S.C. § 1983, a complaint must allege that the conduct complained of  
28 was committed by a person acting under color of state law and that the conduct deprived a person of a

1 right, privilege, or immunity secured by the Constitution or laws of the United States. *Parratt v. Taylor*,  
2 451 U.S. 527, 535 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986). Section  
3 1983 is the appropriate avenue to remedy an alleged wrong only if both of these elements are present.  
4 *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

5 Plaintiff must also allege facts showing how individually named defendants caused or personally  
6 participated in causing the harm alleged in the complaint. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir.  
7 1981). A defendant cannot be held liable under 42 U.S.C. § 1983 solely on the basis of supervisory  
8 responsibility or position. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 694 n.58  
9 (1978). A theory of *respondeat superior* is not sufficient to state a § 1983 claim. *Padway v. Palches*, 665  
10 F.2d 965 (9th Cir. 1982).

11 Although complaints are to be liberally construed in a plaintiff's favor, conclusory allegations of  
12 the law, unsupported conclusions, and unwarranted inferences need not be accepted as true. *Id.* While the  
13 court can liberally construe plaintiff's complaint, it cannot supply an essential fact an inmate has failed to  
14 plead. *Pena*, 976 F.2d at 471 (*quoting Ivey v. Board of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th  
15 Cir. 1982)).

16 However, when a person confined by government is challenging the very fact or duration of his  
17 physical imprisonment, and the relief he seeks will determine that he is or was entitled to immediate  
18 release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.  
19 *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). In order to recover damages for an alleged  
20 unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness  
21 would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or  
22 sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state  
23 tribunal authorized to make such determination, or called into question by a federal court's issuance of a  
24 writ of habeas corpus, 28 U.S.C. § 2254. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). A claim for  
25 damages bearing that relationship to a conviction or sentence that has not been so invalidated is not  
26 cognizable under § 1983. *Id.*

27 Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider  
28 whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or

1 sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the  
2 conviction or sentence has already been invalidated. *Id.* If the court concludes that the challenge would  
3 necessarily imply the invalidity of the judgment or continuing confinement, then the challenge must be  
4 brought as a petition for a writ of habeas corpus, not under § 1983.” *Butterfield v. Bail*, 120 F.3d 1023,  
5 1024 (9th Cir.1997) (quoting *Edwards v. Balisok*, 520 U.S. 641 (1997)).

6 In this case, Plaintiff seeks \$10 million in compensatory damages against a police detective, police  
7 chief deputy prosecutor, the City of Lacey, and the County of Thurston, alleging false arrest, malicious  
8 prosecution and false imprisonment. Dkt. # 1-2. However, there is no allegation that the conviction or  
9 sentence of which Plaintiff complains has been reversed on direct appeal, expunged by executive order, or  
10 declared invalid by a state tribunal. Based on the allegations in his proposed complaint, it appears that  
11 Plaintiff is challenging the validity of his conviction. Therefore, his challenge must be brought as a  
12 petition for a writ of habeas corpus and not as a complaint under § 1983.

13 Due to the deficiencies described above, the court will not serve the complaint. Plaintiff shall file  
14 an amended complaint curing, if possible, the above noted deficiencies, or show cause explaining why  
15 this matter should not be dismissed **no later than January 9, 2009**. If Plaintiff files an amended  
16 complaint under § 1983, the amended complaint shall consist of a **short and plain statement** showing  
17 that he is entitled to relief. Plaintiff shall allege with specificity the following:

- 18 (1) the names of the persons who caused or personally participated in causing the  
19 alleged deprivation of his constitutional rights;
- 20 (2) The dates on which the conduct of each Defendant allegedly took place; and
- 21 (3) the specific conduct or action Plaintiff alleges is unconstitutional.

22 Plaintiff shall set forth his factual allegations in separately numbered paragraphs and shall attach  
23 only those exhibits relevant to the factual allegations contained within the amended complaint.


24 Plaintiff is further advised that this amended pleading will operate as a complete substitute for  
25 (rather than a mere supplement to) the present complaint. Plaintiff shall present his complaint on the form  
26 provided by the Court. The amended complaint must be legibly rewritten or retyped in its entirety, it  
27 should be an original and not a copy, it may not incorporate any part of the original complaint by  
28 reference, and **it must be clearly labeled the “First Amended Complaint” and Cause Number C08-  
5719RBL/KLS must be written in the caption.** Additionally, Plaintiff must submit a copy of the “First

1 Amended Complaint” for service on each named Defendant.

2 **Plaintiff is cautioned that if he fails to show cause or amend his complaint by January 9,**  
3 **2009, the Court will recommend dismissal of this action as frivolous pursuant to 28 U.S.C. § 1915**  
4 **and such dismissal will count as a “strike” under 28 U.S.C. § 1915(g).**

5 The Clerk is directed to send Plaintiff the appropriate forms that he may file an amended  
6 complaint. The Clerk is further directed to send a copy of this Order and a copy of the General Order to  
7 Plaintiff.

8 Dated this 10th day of December, 2008.

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11 Karen L. Strombom  
12 United States Magistrate Judge  
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